

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CACR07-948

September 24, 2008

LAKEELA WEBB

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FOURTH DIVISION [CR 05-3424]

HONORABLE JOHN W. LANGSTON,
JUDGE

REVERSED AND REMANDED

LaKeela Webb was convicted by a Pulaski County jury of the offenses of negligent homicide and second-degree endangering the welfare of a minor in connection with the death of her two-month-old son, Jayce Burks. She was sentenced to one year in the county jail on each offense, to be served concurrently, and she was also fined \$1,000 for the endangering-the-welfare-of-a-minor conviction. Webb raises six issues on appeal. She argues that the trial court erred in denying (1) her motion for directed verdict on the charge of negligent homicide; (2) her motion for directed verdict on the charge of endangering the welfare of a minor in the second degree; (3) her motion to suppress evidence; (4) her motion to dismiss the endangering charge on the basis that it was filed outside the statute of limitations; (5) her motion to dismiss the endangering charge on the

basis that she was not given a speedy trial; and (6) her motion to dismiss the endangering charge on the basis of violation of her due-process rights. We find her third argument, that the trial court erred in denying her motion to suppress evidence, to be persuasive, and we reverse and remand this case for a new trial.

Jayce Burks was born on March 4, 2005, and he died on May 7, 2005. Webb was originally charged with manslaughter and was tried in August 2006; that trial ended in a mistrial. After the mistrial, the State amended the information to add the offense of second-degree endangering the welfare of a minor. Webb was tried on June 6, 2007, for the offenses of manslaughter and second-degree endangering the welfare of a minor; she was convicted of negligent homicide and of the endangering charge.

Webb told several versions of the circumstances surrounding Jayce's death to different people. James Burks, Jayce's father, testified that on May 7, 2005, he and Webb had taken Jayce to the doctor for a checkup and there were no problems. Burks said that Webb called him later that night and told him that she was going out for a "First Friday" party, and they were supposed to "hook up" later that evening. Webb called Burks later that night, and although he offered to go to Webb's house, she told him that she wanted to "get a room," so he gave her money to get a hotel room. He said that Webb was drunk when he talked to her; that she came to get the money from him between 2 and 3 a.m.; that he arrived at the hotel around 3 a.m.; and that Webb was waiting on him when he arrived. He also testified that Webb told him Jayce was with her mother; that they stayed all night at the hotel; and that the maid woke them up around 12:45 p.m. that next

day. Further, according to Burks, Webb told him that she had to go get Jayce when they woke up, but that she did not seem in a panic. Burks testified that later, when Webb called him to inform him that Jayce had died, she told him that she had done something really bad and that she was sorry – that she had left Jayce at the house the whole time she was gone and that when she got back to the house, there was a bag over his face and he was not breathing. Burks related that when he visited Webb at her house in Maumelle, Jayce would sleep with him or in a bassinet; he said that Jayce rarely slept in the baby bed, that Webb basically used it for storage.

Cheryl Rutledge, Jayce's grandmother, testified that Webb had asked her to babysit Jayce on the weekend of May 7, 2005, but she told Webb that she would be out of town that weekend. Rutledge said that when she arrived at Webb's house after learning of Jayce's death, Webb was in bed and kept stating that she was sorry, that she thought he would be all right. Rutledge also stated that at the graveside service, Webb hugged her and told her that she was sorry and asked that she please forgive her.

Brittany Robinson testified that she was at Webb's mother's house in Sherwood on May 7, 2005, when Webb arrived with Jayce in her arms. Robinson said that there was "no life" in Jayce; that he had blood on his face; and that Webb said that a plastic bag had "flown over his face." In her written statement to the police, Robinson reiterated that Webb had stated that Jayce had suffocated from a plastic bag.

Officer Scott Hicks of the Sherwood Police Department testified that he responded to Webb's mother's address in Sherwood, where he observed Webb leaving the house.

When he stopped her, she was crying and asked him to please help her, that her baby was having difficulty breathing, that he was not breathing. Initially, Webb told Hicks that she had put Jayce down for a nap and when she returned a few seconds later, she found him with a bag over his face. When Hicks continued to question her, Webb said that it was a longer period of time, maybe fifteen or twenty minutes, and then the time period became nearly an hour.

Officer Chris Cone of the Sherwood Police Department testified that he investigated Jayce's death, and in the course of the investigation, he had spoken with Webb, who initially told him that she had left the night before around 10 p.m. and had returned on Saturday morning around 9 a.m., and that when she arrived home, Jayce was in his crib, awake and crying. Webb said that she gave Jayce his pacifier and left the room, and when she came back into the room around 12:30 p.m., she found him motionless in the bed with a plastic bag on his face. Cone testified that he noticed one significant difference in what Webb told him and what he heard her say when she spoke with Deputy Coroner Garland Camper — she told Camper that she had left Jayce with her sister the night before. Noting this discrepancy, Cone read Webb her *Miranda* rights, and she then told him that she had left her house the night before around 10 p.m., leaving Jayce home alone, met Jayce's father at a club, and then went to a motel with him before returning to her house around noon on May 7. Webb told Cone that she found Jayce awake and crying in his bed when she returned home, and that she gave him his pacifier and left the room; but when she returned about forty-five minutes later, she found Jayce

lying motionless in the bed with a plastic bag across his face. Webb told Cone that the ceiling fan was on in the room, and that she supposed it blew the bag onto his face. Webb told Cone that the bag was a small plastic trash bag, and that she kept several of them in the crib, as well as clothing.

Dr. Daniel Konzelman, the medical examiner who performed Jayce's autopsy, testified that he was not able to determine a cause of death because he did not find an obvious cause. He said that he was suspicious that the death might have been caused by asphyxia, but that there were no findings in the autopsy that would lend credence to that. However, he said that suffocation did not always leave evidence, and that it would not take much force to suffocate a fairly weak infant. Konzelman said that while there was some indication of blood coming out of Jayce's nose or mouth, it was not technically blood but more of a red watery mixture that had some blood mixture in it that appeared to be consistent with fluid coming up from the lungs after death. However, Konzelman said that the fluid, which was determined to be Jayce's, was not an indication of suffocation. Konzelman also testified that in his opinion, Jayce did not die of SIDS, as there were circumstances of death that left questions about whether it was a natural death; that he could not rule out suffocation as a cause of death, but could not say with any degree of medical certainty that suffocation was the cause of death; and that he could not say it was a homicide, an accidental death, or a death from natural causes.

I. & II. Sufficiency of the Evidence

Webb's first two points deal with the sufficiency of the evidence to support her convictions. In *Williams v. State*, 363 Ark. 395, 401, 214 S.W.3d 829, 832 (2005) (citations omitted), our supreme court held:

[A]n appellant's right to be free from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. Additionally, when reviewing a challenge to the sufficiency of the evidence, we consider all the evidence, including that which may have been inadmissible, in the light most favorable to the State.

a. Negligent Homicide

A person commits negligent homicide if she "negligently causes the death of another person." Ark. Code Ann. § 5-10-105(b)(1) (Repl. 2006). A person acts negligently with respect to attendant circumstances or as a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur. The risk must be of such a nature and degree that the actor's failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor. Ark. Code Ann. § 5-2-202(4) (Repl. 2006).

Webb argues that the State failed to satisfy the "corpus delicti rule," found at Arkansas Code Annotated section 16-89-111(d) (1987), which provides that "a confession

of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed.” The corpus delicti rule requires only proof that the offense occurred and nothing more. *Ware v. State*, 348 Ark. 181, 75 S.W.3d 165 (2002). In *Ware*, our supreme court further held,

[T]he State must prove (1) the existence of an injury or harm constituting a crime and (2) that the injury or harm was caused by someone’s criminal activity. This court has held that it is not necessary to establish any further connection between the crime and the particular defendant.

In a murder case, this rule requires the State to prove that the deceased came to his death at the hands of another person. This court has recognized, however, that there is no requirement that medical testimony be provided regarding the cause of death. Both elements, the fact of death and the cause of death, may be shown by strong and unequivocal circumstantial evidence such as to leave no ground for reasonable doubt; thus, where there is some proof of the *corpus delicti*, its weight and sufficiency is properly left to the jury.

348 Ark. at 191-92, 75 S.W.3d at 171.

We reject Webb’s argument that the State failed to satisfy the corpus delicti rule. While it is true that the medical examiner could not give a cause of death, in accordance with *Ware*, medical testimony regarding the cause of death is not required. Jayce’s father testified that he and Webb had taken Jayce for a medical checkup on Friday, May 6, 2005, and that there were no problems. He also testified that Webb was not at home on that Friday night before Jayce died on Saturday; in fact, he confirmed that he was with Webb from early Saturday morning until almost 1 p.m. Saturday afternoon. Jayce’s grandmother testified that Webb had asked her to babysit on the weekend of Jayce’s death, but she told Webb that she would be out of town. There was physical evidence. Plastic bags were

found in the crib, and the bag that was removed from the house had Jayce's DNA on it in the form of a bloody fluid. The ceiling fan was on high in the baby's room, and there was blood on the crib sheet. After Jayce's death, Webb gave conflicting statements as to the events surrounding Jayce's death, such as whether she left Jayce alone or with someone and what time she arrived back at home. When Webb found Jayce not breathing, she did not call 911 or take him to the closest hospital; rather, she took him all the way from Maumelle to Sherwood. All of this evidence, taken together, establishes some proof of corpus delicti, and where there is some proof of corpus delicti, its weight and sufficiency are properly left to the jury. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002).

b. Second-Degree Endangering the Welfare of a Minor

A person commits the offense of endangering the welfare of a minor in the second degree if "she knowingly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of another person known by the person to be a minor." Ark. Code Ann. § 5-27-206(a)(1) (Repl. 2006).

Webb makes the same argument under this subpoint that she makes in her argument regarding the sufficiency of the evidence for negligent homicide - that there was no corpus delicti. Again, we reject this argument. The evidence to establish the endangering charge is the same that the State used to establish the negligent-homicide charge. On the day before his death, Jayce had been to the doctor and received a good report. Jayce's father, James Burks, recounted that he was with Webb from early on the morning of May 7 until early that afternoon. Webb had asked Jayce's grandmother to

keep him on the weekend of his death, but she told Webb that she would be out of town and could not do it. Plastic bags were found in the crib, one of which had a bloody fluid containing Jayce's DNA on it. The ceiling fan was on high in the baby's room, and there was blood on the crib sheet. After Jayce's death, Webb gave conflicting statements as to the events surrounding Jayce's death, such as whether she left Jayce alone or with someone and what time she arrived back at home. As addressed in the earlier subpoint, all of this evidence, taken together, establishes some proof of corpus delicti, and where there is some proof of corpus delicti, its weight and sufficiency are properly left to the jury. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002).

III. Denial of Motion to Suppress Evidence

In *Jones v. State*, 101 Ark. App. 226, 228, ____ S.W.3d ____, ____ (2008) (citations omitted), this court stated:

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence.

While acknowledging that her custodial statement was not admitted into evidence during trial, Webb first argues that this court should consider the legality of the statement "as it is intertwined with the search of [Webb's] residence and is a fruit of the poisonous tree." However, because Webb's custodial statement was not admitted into evidence, she cannot demonstrate any prejudice, *Simpson v. State*, 339 Ark. 467, 471, 6 S.W.3d 104,

107-08 (1999), and there would be no practical effect in having this court rule on this issue, as it is moot.

Webb also contends that the three searches of her house in Maumelle were illegal and the evidence seized in those searches should be suppressed. There were three warrantless entries by Maumelle police officers that occurred at Webb's house — one entry upon response to the house after information was received that there was a death of a baby to secure the scene, a second entry to ensure that no evidence would be lost until consent was granted, and a third entry after Webb gave Deputy Coroner Garland Camper written consent for Camper and his deputy, Julie Voegele-Cox, to search her residence and car for evidence relating to their duties. Physical evidence, including the plastic bag with Jayce's bloody DNA on it, was removed from the scene by Maumelle police officers during the third entry into Webb's residence.

In *Robbins v. State*, 94 Ark. App. 393, 397, 231 S.W.3d 79, 81-82 (2006) (citations omitted), this court held:

A warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment, and the burden is on the State to prove that the warrantless activity was reasonable. However, an officer may enter a home without a warrant if the State establishes an exception to the warrant requirement. An exception to the warrant requirement exists where, at the time of entry, there are probable cause and exigent circumstances. Probable cause is determined by applying a totality-of-the-circumstances test, and exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot

pursuit of a suspect. In evaluating whether exigent circumstances exist, we are to consider the extent to which the police had an opportunity to obtain a warrant, and whether it was foreseeable that the chosen police tactics might precipitate the kind of circumstances contemplated by Rule 14.3.

Rule 14.3 of the Arkansas Rules of Criminal Procedure provides the circumstances in which a warrant is not required for emergency searches. An officer may enter a premises or vehicle without a search warrant to perform an emergency search if he has reasonable cause to believe that the premises or vehicle contain (a) individuals in imminent danger of death or serious bodily harm; (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed.

Although Webb argues that the first entry into her home after officers received information that the death of a baby occurred at that address was “woefully void” of any reasonable cause that would permit an emergency warrantless search, we disagree. The responding officer, after receiving information that a child had died at the residence, acted under exigent circumstances to determine whether there were other victims or if a suspect remained in the house. *Cf. Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992) (holding that application of the exigent circumstance exception should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed).

There was testimony at the suppression hearing that officers entered the residence a second time to ensure that evidence was not subject to any type of destruction or loss. Of

course, officers had already entered the house and secured the scene. Although the officers did not remove any evidence during the second entry, there was no practical purpose for this warrantless entry, since the scene had already been previously secured in the first entry.

Officers did remove evidence during the third warrantless entry. The State argues, citing *Newton v. State*, 366 Ark. 587, 237 S.W.3d 451 (2006), that the items seized would have been “inevitably discovered” because Webb had given Pulaski County Chief Deputy Coroner Garland Camper and his deputy, Julie Voegele-Cox, written permission to search the house and because the officers were assisting Camper with his investigation; therefore, the evidence was still admissible. We cannot agree.

Rule 11.3 of the Arkansas Rules of Criminal Procedure provides that “A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.” In this case, Camper testified that he asked Webb to sign a consent-to-search form for the Maumelle address and for her vehicle, which she did, and that he advised her that he was not conducting a criminal investigation. He did not tell Webb that police officers were going into her home. He specifically put the names of the two people she was authorizing to search on the form — his name and Voegele-Cox’s. Camper testified that he did not remove any items from the house, and that if anything was removed, it was after his departure from the house. He said that when he asked Webb for consent to search, he was not obtaining authorization for the police department, and that he did not need the police department to assist him in the search of the house. Here, the Maumelle

officers could have obtained a search warrant to search Webb's house, which they failed to do. The fact that Camper obtained specific consent for him and Voegele-Cox to search the house does not inure to the benefit of Maumelle police officers or supplant their failure to obtain a search warrant. While Webb gave consent to search her house and vehicle, she specifically limited the scope of that consent to Camper and Voegele-Cox. As pointed out in the concurrence of *Burroughs v. State*, 96 Ark. App. 289, 241 S.W.3d 280 (2006), the consent to search in that case was limited to one officer, and it did not translate into consent for other officers to enter the house. For this reason, we hold that the trial court erred in not suppressing the evidence found in the warrantless search, and we reverse and remand for a new trial.

Although we are reversing and remanding this case based upon the failure to suppress evidence found in an illegal search, we hereafter address three other issues raised by Webb because they are likely to be raised again in a new trial.

IV. Denial of Motion to Dismiss - Statute of Limitations

Webb argues that the trial court erred in denying her motion to dismiss the second-degree endangering-the-welfare-of-a-minor charge on the basis that the charge was filed outside the one-year statute of limitations prescribed for misdemeanors in Ark. Code Ann. § 5-1-109(a)(3) (Repl. 2006). The incident giving rise to the endangering charge occurred on May 7, 2005, and the endangering charge was not filed until April 6, 2007. Although Webb acknowledges that subsection (g)(2) of the above statute carves out an exception to the one-year statute of limitations, providing that the period of limitation

does not run “during any period when a prosecution against the accused for the same conduct is pending,” she argues that the exception only applies to prosecutions against the accused for the same *conduct*, defined as an act or omission and its accompanying mental state, as defined in Ark. Code Ann. § 5-2-201, not just a charge arising out of the same incident. We disagree.

“A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” *State v. Thompson*, 343 Ark. 135, 142, 34 S.W.3d 33, 37 (2000) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In this case, Webb’s conduct gave rise to two different offenses requiring two different mental states — acting knowingly, in the case of the endangering charge, while acting negligently with respect to the negligent-homicide charge. These two separate charges arise out of the same conduct; therefore, Webb was properly charged under the (g)(2) exception to the statute of limitations.

V. Denial of Motion to Dismiss - Speedy Trial

Under this point, Webb contends that the charge of second-degree endangering the welfare of a minor should be dismissed on speedy-trial grounds. She correctly notes that Rule 28.1(b) of the Arkansas Rules of Criminal Procedure requires that a defendant be brought to trial within twelve months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3. *See also Rhoden v. State*, 98 Ark. App. 425, 256 S.W.3d 506 (2007). She argues that for speedy-trial

purposes, her right to a speedy trial began to run when she was arrested for the offense of manslaughter on June 28, 2005, and she was not brought to trial on the second-degree endangerment charge until June 6, 2007. Webb concedes that she initially stood trial on August 23, 2006, but a mistrial was declared; however, the endangering charge was not filed until April 6, 2007, over seven months later.

On these facts, Webb requests that our supreme court's holding in *Johnson v. State*, 337 Ark. 477, 989 S.W.2d 525 (1999), be overruled. This court cannot overrule our supreme court's precedent. *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994). In *Johnson*, our supreme court held:

Rule 28.2 [of the Arkansas Rules of Criminal Procedure] contemplates that the clock for speedy-trial purposes begins to run from the date of the arrest for all charges stemming from the same criminal episode, irrespective of when any charge is filed. The offenses here arose from the same criminal episode. It logically follows that any excludable periods under Ark. R. Crim. P. 28.3 must be figured into the speedy-trial calculation and applies to all charges stemming from the same criminal episode for which the original arrest was made. Otherwise, the prosecutor would be forced to calculate a different speedy-trial period for each charge filed and try the most recently filed charge first, thereby producing an illogical result.

337 Ark. at 486, 989 S.W.2d at 529.

The parameters of *Johnson* are applicable in this case. Webb was arrested on June 28, 2005, and she was originally tried for manslaughter on August 23, 2006, which ended in a mistrial. Webb was retried on the manslaughter charge on June 6, 2007, along with the endangering charge, which was added on April 6, 2007. Webb does not allege any speedy-trial violation from the date of her arrest on June 28, 2005, until the date of the mistrial. She also does not argue that there was a speedy-trial violation with respect to the

manslaughter charge from the date of the mistrial until the date of the new trial on June 6, 2007. The twelve-month period for speedy-trial purposes commences to run from the date of mistrial when a defendant is to be retried after a mistrial, in accordance with Rule 28.2(c) of the Arkansas Rules of Criminal Procedure. Because the endangering charge stemmed from the same criminal incident, and because Webb was retried within the twelve-month period after her retrial, the endangering charge falls within the parameters of *Johnson*, and Webb's argument must fail.

VI. Denial of Motion to Dismiss - Due Process

Webb argues that the trial court erred in denying her motion to dismiss the charge of second-degree endangering the welfare of a minor because she was "greatly prejudiced by the State's delay in charging her with endangering the welfare of a minor just shy of two (2) years from the alleged incident." She contends that it is "grossly unfair" for the State to wait until after the mistrial in this case to charge her with the offense of endangering the welfare of a minor after the State received the benefit of the revelation of the weaknesses and defenses in the case of her first trial. We disagree.

In *Young v. State*, 14 Ark. App. 122, 127, 685 S.W.2d 823, 826 (1985), this court held that a delay of almost three and one-half years was not a denial of due process, stating:

[M]ere preindictment delay is not a sufficient ground for aborting a criminal prosecution within the period of limitation. The accused has the burden of first showing prejudice resulting from the loss of witnesses or physical evidence or the dimming of the witnesses' memory and how that loss is prejudicial to him. The burden is then on the government to give a satisfactory reason for the delay. The courts grant the government considerable leeway in its timing of the arrest and indictment, and only the prejudice resulting from unreasonable delays, improper

purposes or as a result of governmental negligence is deemed to be a denial of due process. Accommodating the administration of justice and the accused's right to a fair trial necessarily involves a delicate balancing of the reason for the delay against the resulting prejudice based on the circumstances of each case.

Webb asserts that Mary Webb and Jamie Clayton, who are now both apparently deceased, could have testified concerning the condition of her home at the time of Jayce's death. Webb has only offered broad assertions that Mary Webb had "direct knowledge" of the circumstances surrounding the incident, and that Jamie Clayton could have impeached James Burks's testimony and "to corroborate others defenses that the defendant has previously reserved the right to assert." These statements do not provide evidence as to how she was prejudiced by the addition of the offense of second-degree endangering the welfare of a minor. Webb has failed to show how she was prejudiced; therefore, the State was not required to provide a satisfactory reason for the delay.

Reversed and remanded.

VAUGHT and BAKER, JJ., agree.